

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BLUEFIELD DIVISION**

**ROBERT WILFONG,** )  
                                )  
                                )  
**Plaintiff,**              )  
v.                             )  
                                )  
**WEST VIRGINIA DEPARTMENT** )  
**OF CORRECTIONS, et al.,** )  
                                )  
**Defendants.**              )

**Civil Action No. 1:14-21127**

**PROPOSED FINDINGS AND RECOMMENDATION**

On July 8, 2014, Plaintiff, acting *pro se* and formerly incarcerated at McDowell County Correctional Center, filed his letter-form Complaint in this matter claiming entitlement to relief pursuant to 42 U.S.C. § 1983. (Document No. 1.) In his letter-form Complaint, Plaintiff states that he “wishes to file a lawsuit against the W.V.D.O.C. and McDowell Co. Corrections.” (*Id.*) Plaintiff explains that he has “went through the chain of command all the way to the Commissioner of Corrections and [he] has been ignored, avoided, and denied any and all relief . . . to resolve a serious incident that occurred.” (*Id.*)

By letter dated July 10, 2014, the Office of the Clerk notified Plaintiff that his letter-form Complaint had been received and filed by the Court. (Document No. 2) The Clerk further provided Plaintiff with the following forms for completion: (1) A form Complaint; (2) An Application to Proceed Without Prepayment of Fees and Costs; and (3) An Authorization to Release Institutional Account Information and to Pay Filing Fee. (*Id.*) A review of the Docket Sheet, however, revealed that Plaintiff failed to complete and file the foregoing forms.

By Order entered on March 2, 2016, the undersigned ordered that (1) Plaintiff “either pay the filing and administrative fee totaling \$400 or file an Application to Proceed *in Forma Pauperis*

by March 31, 2016," and (2) Plaintiff "amend his Complaint to specifically set forth his constitutional claims and state specific facts as to how each defendant violated his constitutional rights" by March 31, 2016. (Document No. 6.) The undersigned further notified Plaintiff as follows:

Failure of the Plaintiff to (1) amend his Complaint, and (2) either pay the filing and administrative fee or file an Application to Proceed *in Forma Pauperis* by March 31, 2016, will result in a recommendation of dismissal of this matter without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and Rule 41.1 of the Local Rules of Civil Procedure for the Southern District of West Virginia.

(Id.) Plaintiff has not responded to the Court's Order that was entered approximately five months ago. Accordingly, the undersigned has determined that Plaintiff has failed to take any steps to prosecute this action, and therefore, Plaintiff's letter-form Complaint in this case should be dismissed.

### ANALYSIS

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and Rule 41.1 of the Local Rules of Civil Procedure for the Southern District of West Virginia, District Courts possess the inherent power to dismiss an action for a *pro se* Plaintiff's failure to prosecute *sua sponte*.<sup>1</sup> See Link v. Wabash Railroad Co., 370 U.S. 626, 629, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962). Rule 41.1 of the Local Rules provides:

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<sup>1</sup> Rule 41(b) of the Federal Rules of Civil Procedure provides:

**(b) Involuntary Dismissal: Effect.** If the plaintiff fails to prosecute or to comply with these rules or any order of court, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule -- except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 -- operates as an adjudication on the merits.

**Dismissal of Actions.** When it appears in any pending civil action that the principal issues have been adjudicated or have become moot, or that the parties have shown no interest in further prosecution, the judicial officer may give notice to all counsel and unrepresented parties that the action will be dismissed 30 days after the date of the notice unless good cause for its retention on the docket is shown. In the absence of good cause shown within that period of time, the judicial officer may dismiss the action. The clerk shall transmit a copy of any order of dismissal to all counsel and unrepresented parties. This rule does not modify or affect provisions for dismissal of actions under FR Civ P 41 or any other authority.

Although the propriety of a dismissal “depends on the particular circumstances of the case,” in determining whether to dismiss a case involuntarily for want of prosecution, the District Court should consider the following four factors:

- (i) the degree of personal responsibility of the plaintiff;
- (ii) the amount of prejudice caused the defendant,
- (iii) the existence of a history of deliberately proceeding in a dilatory fashion, and
- (iv) the existence of a sanction less drastic than dismissal.

Ballard v. Carlson, 882 F.2d 93, 95 (4th Cir. 1989). In consideration of the first factor, the Court finds that the delays in this case are attributable solely to Plaintiff as the Defendants have not been required to make an appearance in this action. Pursuant to 28 U.S.C. § 1915, federal courts may authorize the commencement of an inmate’s civil action *in forma pauperis* upon the inmate’s filing an Application to so proceed, together with an Affidavit stating the nature of the action and Plaintiff’s belief that he is entitled to redress. 28 U.S.C. §§ 1915(a)(1) and (2) (2002). “Section 1915 is intended to allow qualified litigants to proceed without having to advance the fees and costs associated with litigation.” DeBlasio v. Gilmore, 315 F.3d 396, 398 (4th Cir. 2003). Plaintiff has not responded to the Court’s Order directing him either to pay the requisite filing and administrative fee totaling \$400.00 or to file an Application to Proceed *in Forma Pauperis*. (Document No. 6.) Plaintiff, therefore, is the sole cause of the delays in this action. With respect to the second and third factors, the record is void of further evidence indicating that Plaintiff has a

history of “deliberately proceeding in a dilatory fashion” or that the Defendants have been prejudiced by the delays in this case.

In consideration of the fourth factor, the Court acknowledges that a dismissal under either Rule 41(b) or Local Rule 41.1 is a severe sanction against Plaintiff that should not be invoked lightly. The particular circumstances of this case, however, do not warrant a lesser sanction. An assessment of fines, costs, or damages against Plaintiff would be unjust in view of Plaintiff’s failure to pay the filing fee. Moreover, explicit warnings of dismissal would be ineffective in view of Plaintiff’s failure to respond to the undersigned’s Order entered approximately five months ago advising Plaintiff that the undersigned would recommend dismissal if Plaintiff failed to complete and file the above forms (Document No. 6). In consideration of all factors, the undersigned concludes that dismissal for failure to prosecute is warranted. Accordingly, the undersigned recommends that this action be dismissed without prejudice unless Plaintiff is able to show good cause for his failure to prosecute.

#### **PROPOSAL AND RECOMMENDATION**

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Court confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED** that the District Court **DISMISS** Plaintiff’s letter-form Complaint (Document No. 1) and remove this matter from the Court’s docket.

The Plaintiff is hereby notified that this “Proposed Findings and Recommendation” is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge David A. Faber. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(d) and 72(b), Federal Rules of Civil Procedure, the Plaintiff shall have seventeen (17) days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of this

Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals.

Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Faber and this Magistrate Judge.

The Clerk is requested to send a copy of this Proposed Findings and Recommendation to Plaintiff, who is acting *pro se*, and transmit a copy to counsel of record.

Date: August 12, 2016.



Omar J. Aboulhosn  
United States Magistrate Judge